No. 15,991

IN THE

United States Court of Appeals

For the Ninth Circuit

HARSH CALIFORNIA CORPORATION, a California corporation, *Appellant,*

vs.

COUNTY OF SAN BERNARDINO, a body corporate and politic, S. WESLEY BREAK, DANIEL MIKESELL, MAGDA LAWSON, PAUL YOUNG, and NANCY SMITH, as members of and constituting the Board of Supervisors of the County of San Bernardino, and ALBERT E. WELLER, County Counsel of the County of San Bernardino, *Appellees.*

On Appeal from the Judgment of the United States District Court for the Southern District of California,

BRIEF FOR THE APPELLEES.

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INTRODUCTION AND SUMMARY.

This appeal is from two orders of the District Court denying injunctive and declaratory relief. They do not involve either the meaning or validity of the amendment to the National Housing Act quoted in Appellant's Brief (p. 2, footnote; p. 3, appendix).

The merits of the position of Appellant Harsh with respect to its tax liability are therefore not in issue. *For the sake of this argument only* it will be conceded that the amendment is valid and that it constitutes a valid defense to any liability Harsh would otherwise have had for the payment to Appellee County of any tax; however, we also ask the Court to assume that these propositions are being disputed in good faith by Appellees, no allegation of fraud or malice having been made.

The District Court found that Harsh "has a plain, speedy and efficient remedy in the courts of the State of California" (Trans. pp. 71 and 72), denied a preliminary injunction against the collection of the tax, and dismissed the action *(ibid.),* while expressly avoiding an adjudication on the merits, (Trans. p. 73). The District Court's orders were explicitly based on the provisions of 28 U.S.C. 1341 (the Johnson Act) (Appellant's Brief—Appendix, p. 1).

The issues raised therefore are these:

(1) Did the District Court have jurisdiction? (Jurisdiction of the Court of Appeals is conceded if the District Court had jurisdiction.) We assert that it did not.

(2) Does Harsh have a plain, speedy and adequate remedy in the courts of California? We assert that Harsh does.

(3) If Harsh has such a remedy, does that fact, in the light of the Johnson Act, justify the denial to Harsh of

(a) Injunctive relief?

(b) Declaratory relief?

We assert that it justifies the denial of both.

Appellant's "Statements of Facts" (Brief, pp. 5-7) is correct, with the following exceptions:

(1) Not "all facts set forth in the complaint" but all facts *well pleaded* in the complaint are admitted. (1 *Barron & Holtzoff, Federal Practice and Procedure,* § 350.)

(2) The taxability of Harsh's possessory interest does not arise from Federal consent. The interest is privately owned, and therefore not exempt (*Offutt Housing Co. v. Sarpy County,* 321 U.S. 253; *De Luz Homes v. San Diego,* 45 Cal. 2d 546); no consent is necessary. In the *Offutt* case *(supra)* there is reference to consent, because the property there was within the exclusive jurisdiction of the United States; no such circumstance is alleged or exists in the case at bar.

(3) Captain Hunter (Brief, p. 6) did not determine "that there was a 'deduction' offset, or credit" or that "such 'deduction' exceeded the amount of the tax" or that "there was no sum owing at all to the County". Captain Hunter determined "the sum of $27,759.00 to be the amount equal to the sum of payments made by the Federal Government to the County of San Bernardino, California, with respect to . . . Barstow Garden Homes . . . applicable to the 1957-58 tax year", and that this sum allegedly paid to the

County was comprised of sums paid for school construction and school maintenance and operation (Trans., p. 23). The remainder of Harsh's statement of what Captain Hunter determined are merely Harsh's conclusions. (This misquotation of Captain Hunter is repeated on page 8 of Appellant's Brief.)

FEDERAL JURISDICTION.

In the District Court Judge Byrne (who, contrary to the statements on pages 17 and 33 of Appellant's Brief, impressed Appellees' counsel as one of the most unconfused and unconfusable judges counsel had ever seen) said "I think it is a very, very close case as to whether the court has jurisdiction" because, he said, the basis of this case is a California tax; if a Federal law gives a defense, it may be interposed in a state court action to collect the tax. He therefore ordered both parties to file special memoranda of points and authorities on the jurisdiction question. We did so; however, Appellees at all times asserted as their primary defense the Johnson Act, as being clear and certain, and the Court ultimately decided the case on that ground without any specific finding on the jurisdictional issue. However, the Court did *not* find any fact indicating that the Court did have jurisdiction (Trans. p. 71); the facts of this case have not yet been put in issue, and no evidence was taken.

In order to establish jurisdiction, two points must be found (28 U.S.C. 1331; Appellant's Brief, Appen-

dix, p. 1): (1) There must be a civil action; (2) The matter in controversy must arise under the laws of the United States. Both of these matters must be factually pleaded.

It is basic that the power of a Federal Court to issue an injunction is dependent upon the existence of some recognized ground of Federal jurisdiction.

> 1 *Barron & Holtzoff, Federal Practice & Procedure,* § 46.

28 U.S.C. § 377 (now § 1651) does not widen the jurisdiction of the Federal Court.

> *Shimola v. Local Board,* 40 F.S. 808, 809.

Neither does *Federal Rule of Civil Procedure* No. 65.

> *Moses Taylor Lodge v. Delaware, L. & W. R. Co.,* 39 F.S. 456, 457.

Neither the remedy of injunction (28 U.S.C. 1651) nor the remedy of declaratory judgment (28 U.S.C. 2201; Appellant's Brief, Appendix, p. 1) extends the Court's jurisdiction.

> *Marshall v. Crotty,* 185 Fed. 2d 622, 626-627;
> *Insular Police Comm. v. Lopez,* 160 Fed. 2d 673, 677 (*cert. den.* 331 U.S. 855);
> *Doehler Metal Furn. Co. v. Warren,* 129 Fed. 2d 43, 45 (*cert. den.* 317 U.S. 663);
> *Dyer v. Kazuhisa Abe,* 138 F.S. 220, 228-229, 231-232;
> *Marshall v. Wyman,* 132 F.S. 169, 173-174;
> *McCarthy v. Watt,* 89 F.S. 841, 842-843.

Please note particularly the discussion in the *Insular Police* case *(supra)* distinguishing the power to employ remedies from the basic question whether there is a civil action before the Court; this case involved mandamus, but mandamus stands on a parity with injunction with respect to 28 U.S.C. 1651, and the same principles must govern both.

(For further discussion of the limitations on injunction, see *Moore's Federal Practice,* 2.08 [5] 65.03 [2], and 65.03 [3].)

The substance of this litigation—the reason why Harsh wants declaratory relief and an injunction; the controversy to be resolved, and the threat to be enjoined—is that the County wants to collect a tax under State law and Harsh thinks that the tax is not collectible. This is not a matter within Federal jurisdiction, and no mere remedy can bring it in.

Thus we arrive at the second part of the jurisdictional argument: that the "matter in controversy" does not "arise under the laws of the United States."

We admit freely that in the collection of this tax a law of the United States will be invoked by the taxpayer. We should perhaps say, in view of the excursion outside the record in Appellant's Brief, page 19, that since the commencement of this Federal action, the County *has* sued in the State Court to collect this tax, that Harsh has pleaded the Housing Act in its answer, and that the County is deemed to have controverted the answer, placing this matter among the facts in issue (C.C.P. Sec. 462). However, the

County has not challenged the legal sufficiency of this defense by general demurrer, nor has the County attempted to strike this defense. The County did, as Appellant states, successfully oppose the intervention of the United States Attorney, and the remedy of injunction (on the ground of adequate legal remedy), but the Federal-law defense is still in the lawsuit. The validity of this defense is denied, but not its availability.

However, the "matter in controversy" is still the amount, if any, of local taxes due.

> "When a complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. . . . Federal courts will not seize litigation from state courts merely because one, normally a defendant, goes to federal court to begin his federal law defense before the state court begins the case under state law."
>
> *Public Service Comm. v. Wycoff,* 344 U.S. 237, 248 (involving both declaratory relief and injunction).

Neither injunctive relief nor declaratory relief can be allowed to circumvent the rule against staying proceedings in a state court.

> *H. J. Heinz Co. v. Owens,* 189 Fed. 2d 505, 508, (9th Cir.), *Reh. den.* 191 Fed. 2d 257, *cert. den.* 342 U.S. 905, *reh. den.* 342 U.S. 934.

The mere fact that Harsh's asserted right arises under Federal law does not confer jurisdiction.

Republic Pictures v. Security 1st Nat. Bank, 197 Fed. 2d 767 (9th Cir.);
Crawford v. Pituch, 91 F.S. 626;
Shulthis v. McDougal, 225 U.S. 561, 569;
Puerto Rico v. Russell & Co., 288 U.S. 482, 484;
Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667.

In further support of the proposition that the "matter in controversy" does not arise under Federal law, see:

Provident Savings v. Ford, 114 U.S. 635;
Metcalf v. Watertown, 128 U.S. 586;
Louisville & N. R. Co. v. Mottley, 211 U.S. 149, 152;
Corbus v. Alaska-Treadwell, 99 Fed. 334, aff'd 187 U.S. 447, 454, 466;
Rensselaer & S.R. Co. v. D. & H. Co., 257 Fed. 555, *cert. den.* 250 U.S. 642;
Deere v. St. Lawrence River P. Co., 32 Fed. 2d 550;
Campbell v. Chase Nat. Bk., 71 Fed. 2d 669, *cert. den.* 293 U.S. 592.

In a case similar to the case at bar, *Board of Supervisors v. Stanley,* 105 U.S. 305, a state validly assessed shares of a national bank. A Federal law nevertheless compelled a *deduction* based on debts of the shareholders; aside from such debts, the tax as well as the assessment was valid. But, the Court said,

> ". . . In cases where there did exist such indebtedness, which ought to be deducted, the assessment was voidable but not void. The assessing officers acted within their authority in such cases until they were notified in some proper manner that the shareholder owed just debts which he was entitled to have deducted. If they then proceeded in disregard of the Act of Congress, the assessment was erroneous, and the case of *People v. Weaver* shows how that error could be corrected." (A reading of the decision will show that by "could" the Court meant "should".)

And what was the procedure in *People v. Weaver* (100 U.S. 539)? It was to litigate in the State Courts.

As Appellant points out (for example, see Brief, p. 14), the Housing Act provides no new remedy to accompany the new deduction from the local property tax. We suppose Appellant will concede that jurisdiction over the collection of local property taxes has normally in the past been in the State Courts. But where the State Courts have long had jurisdiction, a Federal statute will not be construed to withdraw jurisdiction without a distinct manifestation of that Congressional intention.

Sanders v. Allen, 58 F.S. 417, 420.

Therefore, rather than inferring that the Housing Act authorizes the extraordinary interference with local tax collection attempted here, we should construe the Act as relying upon State Courts, State officers, and State procedures for the proper computation and collection of the tax under all applicable laws, including this one.

When a statute lacks affirmative language showing that Congress intends to burden the Federal Courts with a new source of litigation, the statute should not be construed to enlarge the Federal jurisdiction.

Association v. Westinghouse, 348 U.S. 437, 460.

Appellant cites (Brief, p. 13) *Dallas v. Higginbotham-Bailey-Logan Co.,* 37 Fed. 2d 513 (a case antedating the Johnson Act), in which property involved was wholly *exempt,* not taxable subject to a deduction. The Court does not cite *Board of Supervisors v. Stanley, supra,* involving a deduction, but instead cites *Iowa Loan & Trust v. Fairweather,* 252 Fed. 605 (which, at page 607, makes just this distinction between excessive taxation and taxation of exempt property) and three Supreme Court cases which all came up through the *State* Courts and did not involve District Court jurisdiction. (Note particularly *Hibernia S. & L. Soc. v. San Francisco,* 200 U.S. 310, in which the California taxpayer had paid his tax under protest and sued for refund in the California Court; the propriety of asserting a Federal exemption in a California Court was not questioned (139 Cal. 205).)

Peyton v. Railway Express Agency (316 U.S. 350; Appellant's Brief, p. 12) was based on 28 U.S.C. § 41 (8), now 28 U.S.C. § 1337. This is not relevant to 28 U.S.C. § 1331; § 1337 lacks the "matter in controversy" requirement. Also, this was not an attempt to anticipate a State suit by commencing a Federal action on what should have been a defense.

First Nat. Bank v. Williams, (252 U.S. 504; Appellant's Brief, p. 12) based jurisdiction upon the

explicit terms of the statutory predecessor of 28 U.S.C. § 1348.

King County v. Seattle School District, (263 U.S. 361; Appellant's Brief, p. 11) was a suit to collect money apportioned to plaintiff by Act of Congress. Obviously, then, plaintiff's primary right was Federal. But Harsh's primary right to his money is not based on an Act of Congress; it is simply Harsh's money, collected in the ordinary course of business. His defense, in our state suit for a local tax, sets up a Federal right, but this does not confer Federal jurisdiction in these facts.

That a Federal-law defense does not create Federal jurisdiction, see the following cases holding that a Federal-law defense does not bring a State suit within the removal statute (28 U.S.C. § 1441):

Gully v. First Nat. Bk., 299 U.S. 109, 113;

In re Winn, 213 U.S. 458, 464-465;

Minnesota v. Northern Sec. Co., 194 U.S. 48, 64 (no removal unless County could have sued Harsh in Federal Court);

Rosecrans v. W. S. Lozier, Inc., 142 Fed. 2d 118, 121;

Beaumont v. Texas R. Co., 296 Fed. 523, 525-526;

Monroe v. Detroit M. & T.S.L. Co., 257 Fed. 728, 784;

Abrams v. Hart Cotton Mills, 85 F.S. 664, 666;

Seber v. Spring Oil Co., 33 F.S. 805, 807;

Braswell v. McGowan, 32 F.S. 678;

B. & O. R. Co. v. Board, 17 F.S. 170, 176 (cannot circumvent by injunction).

> "But even assuming that the bill showed upon its face that the relief sought would be inconsistent with (Federal law), it would only demonstrate that the bill could not be maintained at all and not that the cause of action arose under (Federal law.)"
>
> *Arkansas v. K. & T. Coal Co.,* 183 U.S. 185, 190.

These cases establish that it is the cause of action of the party seeking to change the *status quo* (here the County) which must be Federal to create Federal jurisdiction, not the defense.

Although Appellant accurately quotes an excerpt from *All-American Aircraft v. Cedarhurst,* 201 Fed. 2d 273 (Brief, p. 13), it is apparent from reading of the decision (and the decision below—106 F.S. 521) that jurisdiction as such was not discussed at all. Jurisdiction under 28 U.S.C. § 1337, however, was apparent.

THE CALIFORNIA REMEDIES.

Assuming that, as Appellant contends, a valid Federal law has set a ceiling upon the amount of tax which may be levied by local taxing agencies upon Appellant's property, is California's legislation so inadequate as to provide no remedy to Appellant, so that Appellant is compelled to invent a Federal remedy or suffer in silence?

To answer this question we must turn to California statutes and California decisions to see what California Courts would do. Even if *Sunset Oil Co. v.*

California (87 Fed. 2d 922; Appellant's Brief, p. 15) meant what Appellant says it means, it would be merely secondary authority on the law of California.

The California statutes, like those of many other jurisdictions, embody the policy that "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every tax-payer is entitled to the delays of litigation is unreason". *Springer v. United States,* 102 U.S. 586, 594, quoted in *Sherman v. Quinn,* 31 Cal. 2d 661, 665. Until the illegality of the tax has been established in a courtroom, the local government should not be deprived of the money (see *Simms v. Los Angeles,* 35 Cal. 2d 303, 315).

Therefore taxes on property which is assessed on the "unsecured roll" (as is Harsh's property), may be summarily collected by seizure and sale without judicial action (Trans., p. 5; Rev. & Tax. Code Sec. 2914—printed in Appellant's Brief, Appendix, p. 4). However, this power is seldom exercised, and has never been exercised in any of our long tax litigation with the Wherry Housing interests.

The only alternative mode of collection is by suit in the State Superior Court (*Rev. & Tax. Code,* Sec. 3003), which, as noted by Appellant (Brief, p. 19), the County is now pursuing. In such a suit the plaintiff of course must prove that the tax is valid and due and the defendant may set up invalidity as a defense, as Harsh has done in the California case now pending. We do not understand why Appellant has not dis-

cussed this taxpayer's remedy in its otherwise thorough brief.

Appellant may, however, say that it *has* discussed this remedy, commencing on page 15 of its brief. But we should not overlook the elementary distinction between counter-claims and cross-complaints, which Appellant refers to on page 15, and mere passive defenses. By counter-claim or cross-complaint, a defendant attempts, directly or indirectly, to satisfy his own claim against the plaintiff. The *Sunset Oil* case says, quite correctly, that a claim which could not be the basis of a suit against the State cannot be the basis of a counterclaim. Since the statute there involved provided no judicial remedy, but only an administrative remedy which defendant had failed to utilize, such a counterclaim would obviously circumvent the statute and permit the defendant to benefit judicially by a claim which was not judicially enforceable.

But the County owes Harsh nothing. Harsh has no claim, nor did it ever have a claim against the County, and therefore no sovereign-immunity problem arises. The California cases cited by Appellant (*Himmelman v. Spanagle,* 39 Cal. 389; *Prescott v. McNamara,* 73 Cal. 236) have nothing to do with this situation. Harsh has merely claimed a *deduction,* which was disallowed by the County. Harsh's contention is that the County seeks money beyond the amount to which (if any) the County is entitled; to assert this position is no counterclaim but a mere defense. This gap cannot be bridged by the ambiguous term "offset" (which is not

used in the statute). There is no California law against asserting *defenses* to County suits or deductions from local taxes; such a law would probably be unconstitutional.

Harsh cites no authority to indicate that such a defense is not maintainable; none exists.

Thereafter, Harsh (commencing on p. 20) discusses four possible remedies in the State Courts.

A) Declaratory Relief.

Viewing the question in the abstract, Harsh might be correct that a taxpayer could not attack a tax by declaratory relief in California. In this regard California legislative policy might conform to that embodied by Congress in the Johnson Act.

It was formerly held by the District Court of Appeal that the state and its subdivisions were not subject to declaratory relief (*Irvine v. Sacramento & San Joaquin Dr. Dist.,* 49 Cal. App. 2d 707; *Bayshore San. Dist. v. San Mateo,* 48 Cal. App. 2d 337). However, this position (along with the *Mayshore* and *Irvine* cases) was expressly disapproved by the State Supreme Court in *Hoyt v. Board,* 21 Cal. 2d 399; *Lord v. Garland,* 27 Cal. 2d 840; *Calif. Physicians' Service v. Garrison,* 28 Cal. 2d 790.

The language of C.C.P. Sec. 1060 (App.'s Brief, pp. 20-21) relating to a "declaration of his rights and duties with respect to another" is broad enough to apply to Harsh; it is not, in its terms or otherwise, restricted to the interpretation of instruments or property rights.

Furthermore, in the Loyalty-Oath tax cases (*First Unitarian Church v. Los Angeles,* 48 Cal. 2d 419; *People's Church v. Los Angeles,* 48 Cal. 2d 899; *First Methodist Church v. Horstmann,* 48 Cal. 2d 901; *Prince v. San Francisco,* 48 Cal. 2d 472; *Speiser v. Randall,* 48 Cal. 2d 903) plaintiffs sought a refund *and* declaratory relief. Some had favorable results in the trial court, but these judgments were reversed in the State Supreme Court on other grounds without any indication that the remedy did not exist. Others failed in the Superior Court; these judgments were affirmed by the State Supreme Court, again without discussion of the availability of this remedy. The U. S. Supreme Court ruled in favor of plaintiffs in all cases, again without ruling on this particular remedy (78 S. Ct. 1332-1354, 1380). At no time in the recorded cases was the remedy questioned.

Declaratory relief in California is a cumulative remedy (C.C.P. Sec. 1062) which may be granted in spite of the existence of other remedies (*Ermolieff v. RKO Radio Pictures,* 19 Cal. 2d 543, 547).

B) Cancellation.

Without accepting Appellant's theories (p. 22) about this remedy, we agree with his conclusion that *Security-First National Bank v. Board,* 35 Cal. 2d 323, 327, held that cancellation of a void tax, although authorized, cannot be compelled by mandamus. However, it should be noted that this relief was held "not available . . . because petitioner had an adequate remedy at law by an action for refund."

C) Payment Under Protest.

On page 23, citing no authority except the sections of the statute, Harsh argues that the remedy of payment under protest is not applicable for two reasons. First, *Rev. & Tax. Code* Sections 5136-5143 are limited to defects in the assessment. Second, because the tax was levied and payable before Capt. Hunter's "determination", *it was not void.*

As to the first reason, we might content ourselves with citing the article in 25 *So. Cal. L. Rev.* 395, 402, n. 49, in which Mr. Holbrook and Mr. O'Neill, the authors, (and counsel for Appellant here) say, with reference to Sec. 5137, ". . . The present Revenue and Taxation Code seems to use the word 'assessment' rather loosely as also including the tax itself." The same authors, in 27 *So. Cal. L. Rev.* 415, 437, discuss the protest procedure without limiting it to defects in the assessment. Since the purpose of the latter law review article was to point out limitations in the existing law, we are sure that the authors would have pointed out the alleged restriction to defective assessments if they believed it to exist.

The statute providing for protest and suit was construed in *Connelly v. San Francisco,* 164 Cal. 101, 103, when it was more strictly worded in terms of "assessment" than it is today. *Pol. Code* Sec. 3819 (Stats. 1895, p. 335) reads as follows:

> "At any time after the assessment book has been received by the tax collector, and the taxes have become payable, the owner of any property assessed therein, who may claim that the assessment

> is void in whole or in part, may pay the same to the Tax Collector under protest, which protest shall be in writing, and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded and when so paid under protest, the payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county, in the Superior Court, to recover back the tax so paid under protest."

Nevertheless, the Court refused to confine the remedy to claims based upon illegality of the *assessment.*

As to Harsh's second reason, it is a mere speculation. Harsh gives no explanation *why,* if the tax became "void in whole or in part" on August 9, when Captain Hunter made his "determination" (Trans. p. 23), the statutory remedy could not then apply. No such restriction exists in the statute or any other authority.

See *Mason v. Johnson,* 51 Cal. 612, in which the protest procedure was approved; there the assessment was valid when made, but a change in extrinsic circumstances caused the tax to be invalid. See also *St. Johns Church v. Los Angeles,* 5 Cal. App. 2d 235, 240; *First Unitarian Church v. Los Angeles,* 48 Cal. 2d 419 (assessment valid under state law attacked on Federal ground; choice of remedy not questioned).

D) Claim and Suit.

Appellant's authority for disallowing the remedy of claim and suit (*Rev. and Tax. Code* Secs. 5096-5107) is even more slender. First (Brief, pp. 24-26), Appellant belabors the point that if *Harsh had paid* before Captain Hunter made his "determination", Harsh could not have recovered. This is idle talk; Harsh has not paid.

On page 27, Harsh gets down to relevant facts and declares that "the tax itself (is) *valid.*" We welcome this concession, but if Appellant means this, what is he doing in Court? Is Appellant asking the Courts to enjoin the collection of a valid tax? The Housing Act (Brief, p. 2) on which Harsh relies, says that "no such taxes . . . shall exceed" a certain amount, less another amount. If, as Harsh repeatedly asserts, our tax did exceed the remainder left after this subtraction (because the subtrahend (Hunter's figure) exceeds the minuend (Harsh's tax computed without the deduction)), then Harsh must believe our tax to be wholly invalidated by the Federal law. The complaint (Trans., p. 12) plainly alleges that the tax is erroneous and illegal. Likewise, its collection must be illegal, and the tax may be recovered under *Rev. and Tax. Code* Sec. 5096 (b), after payment.

In short, if the tax is valid, let Harsh pay it and be quiet; if the tax is not valid, let Harsh pay it and sue for a refund.

Also on page 27, Harsh seems to play on words. Of course, the Tax Collector has a duty to collect any tax that is on the rolls. But if that tax is or has become

illegal, the tax is "illegally collected", in spite of procedural regularity. (See, for example, *S. Siwel Co. v. Los Angeles,* 27 Cal. 2d 724.)

But, says Appellant (p. 27), there is "no administrative or judicial mode provided by state statute" by which the deduction may be established. To this there are two answers.

First, it is false. If the tax is now illegal, Harsh can proceed either under the protest-payment or claim-and-suit procedures. These procedures are not restricted to an illegality arising under *California* law. A valid, paramount Federal law renders illegal that which it prohibits. No California law can create a legal duty to do anything forbidden by Federal law. If Federal legislative action has rendered our tax illegal, no Federal judicial action is needed to confirm this; our State Courts will apply all relevant laws, or, in due time, the United States Supreme Court will make them do so. See *Columbia Savings Bank v. Los Angeles,* 137 Cal. 467 (U.S. Bonds), and *First National Bank v. San Francisco,* 129 Cal. 96 (National Bank), in which Federal immunities were enforced in California Courts. See also Art. XIII, Sec. 1, California Constitution, exempting from State taxation any property exempt "under the laws of the United States."

Second, however, if the Federal legislative action has *not* rendered our tax illegal, the Federal Court cannot step in and create an illegality. "No mode has been provided" to accomplish this paradox. If the tax

is legal, Harsh has no standing in any Court, either to enjoin it or to resist our suit.

As appellant's final argument against the claim-and-suit procedure, the suggestion is made that "the ground of 'error' or 'illegality' must be one running to the person claiming the refund". No authority is cited for this flight of fancy. Of course it is true that only the person who has paid can get the money back, but the cause of the illegality need not be connected to him personally. Thus in *Hayes v. Los Angeles,* 99 Cal. 74, one who paid a tax was permitted to sue for a refund which was due him because someone else had previously paid the same tax on the same property. The remedy of payment under protest is also available in these circumstances (*Morgan Adams, Inc. v. Los Angeles,* 209 Cal. 696).

The remedy of claim and suit has been held adequate in the following cases in addition to those already cited:

Nevada-Calif. Elec. Corp. v. Corbett, 22 F.S. 951; 954 (Calif. Use Tax);

Corbett v. Printers and Pub. Corp., 127 Fed. 2d 195 (Calif. Sales Tax);

Helms Bakeries v. State Board, 53 Cal. App. 2d 417, *cert. den.* 318 U.S. 756 (Sales Tax).

Like the protest procedure, the claim procedure applies to taxes which are erroneously or illegally collected even if not erroneously or illegally levied.

Siwel v. Los Angeles, 27 Cal. 2d 724, 730-731;

Evans v. San Joaquin, 67 Cal. App. 2d 452, 454-455.

Although we have followed Appellant's argument to the extent of discussing the protest method (*Rev. and Tax. Code* Sec. 5136) and the claim method (Sec. 5096) separately, the two remedies are concurrent.

Outer Harbor Dock Co. v. Los Angeles, 49 Cal. App. 120.

Therefore, they are both available for an attack on a tax if either is available; the taxpayer may follow either procedure, or both. The decisions which authorize either procedure are authority for the other as well.

E) Extraordinary Remedies.

Lastly, Harsh complains (pp. 29-30) that mandamus, certiorari and injunction are not available to him in the State Courts. This is indeed true; as he notes on pages 19 and 30, he has attempted to get an injunction in the California Court by cross-complaint, and our demurrer was sustained without leave to amend. The Court took this action because, according to a firm and certain line of precedents, the statutory remedies in California are adequate and *therefore* the extraordinary remedies do not lie.

Security First National Bank v. Board of Supervisors, 35 Cal. 2d 323;

Vista Irrigation District v. Board of Supervisors, 32 Cal. 2d 477;

Sherman v. Quinn, 31 Cal. 2d 661;

Rickard v. Council, 49 Cal. App. 58;

Robinson v. Gaar, 6 Cal. 273, 275;

DeWitt v. Hays, 2 Cal. 463, 469.

At least since the enactment of the provisions for 5% interest in California *Revenue and Taxation Code* Section 5105, it has not been questioned in California that the legal remedy is adequate, and that the remedy of injunction no longer lies against the collection of an illegal property tax (if it ever did lie).

See *California Property Tax Trends* by W. Sumner Holbrook, Jr., and F. H. O'Neill, 25 So. Cal. L. Rev. 403-404, footnote 28, in which the authors suggest that an injunction might be employed only if a lessee is under compulsion to pay a tax on property owned by his landlord; however, in the case at bar, the property tax is upon a possessory interest and it is not disputed that Harsh is the owner of this interest. Further to the effect that neither injunction nor mandate is available in California, see *The California Property Tax,* Holbrook and O'Neill, 27 So. Cal. L. Rev. 415, 436, wherein the authors state:

> ". . . The former existing right to injunction was an extreme remedy. It was permitted primarily because until December, 1941, a taxpayer could not, on a refund or protest suit, recover any more than the principal of the illegal tax. Since that date the taxpayer has been able to recover interest as well as principal of the illegal charge."

Concerning the adequacy of California judicial procedures for recovery of taxes collected erroneously or illegally, the California Supreme Court stated in the case of *Sherman v. Quinn,* 31 Cal. 2d 661, 665:

> "However, should an assessor deny the exemption to a veteran, an adequate procedure is pro-

vided by statute whereby taxes erroneously levied and collected may be refunded, together with interest thereon, upon a claim therefor. (See Revenue and Taxation Code Sec. 5096 *et seq.*) This form of procedure, widely used in the tax field, is based upon the principle that 'delay in the proceedings of the officers, upon whom the duty is devolved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public.' (*Dows v. City of Chicago,* 11 Wall. 108, 110, 20 L. Ed. 65). The veteran, therefore, has a plain, speedy and adequate remedy in the ordinary course of law, and mandamus is not available. (C.C.P. Sec. 1086). 'The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government. The idea that every taxpayer is entitled to the delays of litigation is unreason.' *Springer v. U.S.,* 102 U.S. 586, 594."

In the light of these fixed principles of California law, which have stood unquestioned for a number of years, the California Superior Court struck out an attempt by Harsh to obtain injunctive relief. As observed by Appellant, however, (Brief, p. 29) the reasoning of the California Courts is identical with the policy of the Johnson Act—that is, that injunctions should not issue when there is an adequate legal remedy (27 *Cal. Jur.* 2d 152 (citing 12 cases); 1 Witkin, *California Procedure,* 859-860).

The essence of Appellant's brief is the argument that the statutory remedies are *not* adequate; Appellant asks the Federal Courts to declare an inadequacy

that the State Courts do not find. But, if this inadequacy were to be found by the State Courts, then the State Courts would provide an adequate extraordinary remedy; there is still no need for a Federal Court to issue an injunction. The case for issuing an injunction cannot be better in the Federal Court than in the State Court. Our State Courts provide a complete set of legal and equitable remedies; Federal intervention is superfluous.

Harsh's arguments (Brief, p. 30) against State injunctive relief require little comment. First, if the tax is illegal because of the disallowance of a statutory deduction, this fact may be proved in the same way as any other fact is proved. Harsh is now trying to prove this very fact in the State litigation.

Second, Appellees caused the striking of the cross-complaint in the State suit on the sole ground of an adequate legal remedy. Appellees are certainly not "estopped" to assert that State injunctive relief *would* be available if no other adequate legal remedy existed. If any State Court finds that Harsh has no legal remedy (for any procedural reason), that same Court will restore the cross-complaint for injunction.

THE EFFECT OF THE JOHNSON ACT.

The Johnson Act (28 U.S.C. 1341) (Appellant's Brief, Appendix, p. 1) prohibits the District Courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State

law where a plain, speedy and efficient remedy may be had in the Courts of such State." We have now shown that several such remedies may be had in the Courts of California; also we rely on the proposition that when the Federal Courts consider the use of equitable powers to thwart a local tax, the legal remedy is presumed to be adequate.

Shelton v. Platt, 139 U.S. 591;
Union Pac. Rr. Co. v. Ryan, 113 U.S. 516, 525.

The question next arises: "Is this an action to enjoin, suspend or restrain the assessment, levy or collection of a California tax?"

Appellant is now attempting to characterize his suit as merely one for declaratory judgment (Brief, p. 2), with injunctive relief as "ancillary" (Brief, p. 3). This is not the song he sang in the District Court. His complaint (Trans., p. 3) is captioned "Complaint for Declaratory Relief, Injunction and Restraining Order" and his prayer (Trans., pp. 14-16) is not only for a declaration but also "that this Court permanently enjoin and restrain the defendants" from "doing any and all acts to enforce the said tax". Paragraph I of the Findings (Trans., p. 71) is therefore literally and exactly correct, in spite of Appellant's charge of error and confusion (Brief, p. 17).

The Johnson Act is broadly construed, and a suit to enjoin the means of enforcement of a tax will not be distinguished from a suit to enjoin collection.

Sears, Roebuck & Co. v. Roddewig, 24 F.S. 321, 324-325.

Further to illustrate Appellant's mysterious shift in emphasis, we note that on or about September 23, 1957, Harsh filed in this action a five-and-one-half page memorandum of points and authorities, commencing as follows: "In this action, plaintiff seeks to restrain the collection of a local tax . . ." In this document, declaratory relief is not mentioned.

Plainly, as this action was originally conceived, it was for *both* declaratory relief and injunction, equally. Our motion to dismiss (which is only extracted in Trans., pp. 30-31) dealt fully with both remedies, and both were equally denied (Trans., pp. 71-74). Plainly also, the injunctive element is directly contrary to the Johnson Act.

(We also note that no serious or irreparable injury is shown. Any illegal part of the tax may be recovered with interest at 5% (*Rev. and Tax. Code, Sec.* 5105, 5141), a rate probably exceeding that now being earned by the sum impounded by the F.N.M.A. (Trans., p. 30). Injunction does not lie without a threat of irreparable injury. (*Public Service Comm. v. Wycoff,* 344 U.S. 237, 240-241).)

But has Harsh gained a more favorable position under the Johnson Act by soft-pedaling the injunctive aspect and emphasizing declaratory relief? The authorities are overwhelming to the effect that the Johnson Act applies as much to one as to the other.

The principle is best stated in *Miller v. City of Greenville,* 138 Fed. 2d 712, 719, as follows:

> ". . . But the facts in this case do not justify maintenance of this action under the Federal

> declaratory judgment statute . . . The object of the suit is to avoid assessment and collection of state taxes, and the same considerations upon which Federal courts of equity have declined, save in exceptional cases, to relieve against state taxes claimed to be unlawful, are controlling in suits under the declaratory judgment statute . . ."

See also *West Pub. Co. v. McColgan,* 138 Fed. 2d 320, 324-327 (declaratory relief held included in Johnson Act; remedies of payment and suit for refund of California Corporation Income Tax held adequate so as to deprive the Federal Court of jurisdiction in a suit for declaratory relief and injunction); *Bucklin Coal Mining Co. v. U. C. C.,* 53 F.S. 484, 486-487 (action for injunction and declaratory relief dismissed); *Richfield Oil Corp. v. United States,* 207 Fed. 2d 864, 870 (limitations of injunction and declaratory relief); *Reiling v. Lacy,* 93 F.S. 462, 468-470, (appeal dismissed 341 U.S. 901); *Collier Advertising Service v. N. Y.,* 32 F.S. 870, 872; *Lawrence Print Works v. Lynch,* 146 F. 2d 996, 998 (denying the equitable remedy of specific performance); *Matthews v. Rodgers,* 284 U.S. 521; *Geo. F. Alger Co. v. Peck,* 74 S. Ct. 605, 98 L. Ed. 1148 (chambers opinion of Justice Reed).

The Supreme Court, treating the subject of declaratory relief in the case of *Hillsborough v. Cromwell,* 326 U.S. 620, (in which the New Jersey remedy was held to be inadequate), stated on page 623:

> ". . . we held in *Great Lakes Dredge and Dock v. Huffman, supra,* (319 U.S. 293) that the policy which led Federal courts of equity to refrain

from enjoining the collection of allegedly unlawful state taxes should likewise govern the exercise of their discretion in withholding relief under the Declaratory Judgment Act . . ."

In the cited case of *Great Lakes Co. v. Huffman,* 319 U.S. 293, the Supreme Court, through Justice Stone, stated on page 300:

". . . With due regard for these considerations, *it is the Court's duty to withhold such relief* when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. *In such a suit he may assert his Federal rights* and secure a review of them by this Court. This affords an adequate remedy to the taxpayer and at the same time leaves undisturbed the state's administration of its taxes . . ." (Emphasis added.)

Thus it appears that in the case at bar, even if plaintiff can assert some Federal right to a deduction which renders a part of the tax illegal, he must first pay this tax to the proper State officer, institute a suit for the recovery of such taxes paid under protest (injecting the Federal question in such suit), and if not satisfied with this State determination of his rights, apply to the Supreme Court for review.

In the same *Great Lakes v. Huffman* case (319 U.S. 293) the Court stated in closing on page 301:

". . . The judgment of dismissal below must therefore be affirmed, but solely on the ground that, in the appropriate exercise of the court's discretion, relief by way of a declaratory judgment

should have been denied without consideration of the merits . . ." (Emphasis added.)

Appellant takes the view that somehow he is helped by *Hillsborough Township v. Cromwell,* 326 U.S. 620; he quotes (Brief, p. 32) from that decision a holding that there was "such uncertainty concerning the New Jersey remedy as to make it speculative whether the State affords full protection to the Federal rights." This statement was based on a long list of citations of New Jersey decisions indicating the absence of a state remedy; there are no such California decisions, but only decisions such as we have cited which support the comprehensiveness of the State remedies. In *Hillsborough* the party asserting an adquate State remedy had nothing but one decision of an inferior court to use as a springboard for the theory that this remedy existed.

In the case at bar, the speculation is wholly on the part of the party who controverts the adequacy of the remedy. Yet he cannot raise even a reasonable doubt; it is a mere possible or imaginary doubt, such as we warn our criminal juries against (*Penal Code,* Sec. 1096).

CONCLUSION.

Repeatedly, Appellant has characterized the tax as *valid* (Brief, pp. 3, 8, 9, 14, 21, 23, 27). If the tax is valid, Appellant has no cause of action in any court.

However if the National Housing Act, (Appellant's Brief, p. 2, N. 1) is applicable as Appellant

contends, the tax is invalid and illegal, because it exceeds "the amount of taxes or assessments on other similar property of similar value, less such amount as the Secretary of Defense or his designee determines . . ." If it is illegal, the various and certain California remedies for illegal taxation are unquestionably open to Appellant, because they are nowhere restricted to illegality arising under *State* law, and have always been broadly construed.

Appellant's position that the State remedies are not available because the tax is *valid,* and that the Federal Courts must enjoin the collection of the tax because it is *invalid,* is contradictory and absurd.

In any event, since the matter in litigation does not arise under Federal law, the Federal Courts lack jurisdiction.

The Orders of Judge Byrne should be affirmed.

Dated, San Bernardino, California,
August 18, 1958.

Respectfully submitted,

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By J. B. LAWRENCE,
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Attorneys for Appellees.

(Appendix Follows.)

Appendix.

Appendix

28 U.S.C. 1337
Commerce and anti-trust regulations.

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

28 U.S.C. 1348
Banking association as party.

The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.

28 U.S.C. 1441
Actions removable generally.

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State

court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

28 U.S.C. 1651
Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

California Constitution, Art. XIII, Sec. 1
Property to be taxed.

All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided . . .

California Code of Civil Procedure
Sec. 462
Allegations not denied, when to be deemed true.

When to be deemed controverted.

Every material allegation of the complaint, not controverted by the answer, must, for the purposes of the action, be taken as true; the statement of any new matter in the answer, in avoidance or constituting a defense or counter claim, must, on the trial, be deemed controverted by the opposite party.

Sec. 1062
Cumulative remedy.

The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action, and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

Sec. 1086
Circumstances authorizing issuance; petition.

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law. It must be issued upon the verified petition of the party beneficially interested.

California Penal Code
Sec. 1096
Presumption of innocence; effect; reasonable doubt.

A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge."